

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 452 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? No
2. To be referred to the Reporter or not? No
3. Whether Their Lordships wish to see the fair copy
of the judgement? No
4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge?
No

KHASIYA DHAMAJASA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 452 of 1994
MR AD SHAH for Petitioner
MR.S.R.DIVETIA,LD.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.R.JAIN

Date of decision: 26/12/96

ORAL JUDGEMENT

PER: S.D. DAVE, J :-

Present one is the Appeal by the Appellants, who are the original accused, and who have been convicted and sentenced by the Ld. Addl. Sessions Judge, Bhavnagar, in Sessions Case No. 166 of 1990, under the orders dated March 24, 1994. Twelve accused persons came to be tried for the alleged commission of the offences punishable under sections 147, 148, 302, 307, 324, 323 and 342, r/w section 149 of I.P.C. and under section 135 of the Bombay Police Act 1951; on the accusation that, they having armed with deadly weapons like spears, axes, iron pipes, kharpiya and sticks etc. had found themselves in an unlawful assembly at about 11.00 p.m. on 1st. September 1990, at village Monpar under the Mahuva Taluka of the Bhavnagar district, with the common object to commit rioting and murder deceased Kalu Jasmat and Bhimji Jasmat and injure the prosecution witnesses, and in furtherance of the said common intention, in fact had committed rioting, killed Kalu Jasmat and Bhimji Jasmat and injured the prosecution witnesses.

The case of the prosecution is that, Benuba Khasiya, a resident of Monpar was suspected to have illicit relations with deceased Kalu Jasmat. On the day of the occurrence, that is on September 01, 1990, after 10 p.m. she had gone out of her house with a view to respond the call of nature. The accused persons or some of them had gone there, intercepted her and later on she was taken to the dela of deceased Kalu Jasmat and was tied down with a rope with the cart lying there, and later on Kalu Jasmat, the deceased was also assaulted and was caused serious injuries. According to the case of the prosecution, the other persons had intervened and they had also sustained certain injuries. The village Police Patel was summoned and he had gone to the spot of the occurrence and had seen the incident in part, and had identified only two of the assailants, though all the rest belonged to his own village of which he was a Police Patel. Any how, he had not drawn up the Occurrence Report but had gone to Bagdana police station with a view to inform the police. Unarmed Head Constable stationed at Bagdana Police Station was informed regarding " some incident " that had happened at village Monpar. Head Constable Chimanlal had proceeded to Monpar in company of five other police constables, but had seen that the dela wherein the incident allegedly had taken place was locked from outside. Later on, dela was got opened and they had seen deceased Kalu Jasmat in the injured condition tied down with the bullock cart. The father of the Kalu namely, Jasmat was also found lying there. Injured

Bhimji Jasmat, Kalu Jasmat and Shambu Jiva were removed to Mahuva hospital. The Police Station Officer Incharge Umarbhai had also accompanied Head Constable Chimanlal to village Monpar and to the spot of the occurrence but nothing was done by him like Chimanlal. PSI Solanki who happens to be the Investigating Officer had also reached the spot of the occurrence and had stayed there for about 45 minutes, but no FIR was registered. One Gambarsing PW-19 Exhibit-89 who was incharge of Mahuva police station had received the yadi at about 6 a.m. on the next day morning from the Hospital and therefore, after posting the necessary entry Exhibit-90 in the police station diary, he had registered the offence and the investigation was entrusted to PSI Shri. Rathwa. Later on these papers were transmitted to Bagdana police station under the yadi at Exhibit91.

Later on the formal complaint of Babubhai Kalu came to be recorded and investigation had started in full swing. Kalu Jasmat meanwhile had lost his life. Bhimji Jasmat had died later on at Ahmedabad. The postmortem examination on their dead bodies came to be performed, and the autopsy reports came to be obtained. The medical certificates in respect of the injured witnesses came to be obtained. Under different discovery panchanamas the muddamal weapons allegedly came to be discovered. Later on, up on the completion of the investigation, the accused persons who were already arrested after filing of the complaint by PW-9 Babubhai, were committed to the Court of Sessions at Bhavnagar. The accused persons had denied the charge, which is at Exhibit-5 and had claimed to be tried. Upon the appreciation of the evidence, learned Addl. Sessions Judge was pleased to come to the conclusion that the charges were proved. This has culminated into the judgment of conviction and sentence dated March 24, 1994.

Following Chart would go to show the sentence awarded to the accused persons.

Offence	Sentence
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302 r/w 149 IPC	Imprisonment for life and a fine of Rs.4000/-, in default, further R.I. for six months.
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307 r/w149 IPC	RI for 10 years and fine of Rs.5000/-, in default for RI for one month.
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324 r/w 149 IPC	R.I. for two years.
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342 r/w 149 IPC R.I. for one year.

148 IPC R.I. for three years

147 IPC No separate sentence.

135 of the BP Act,1951 R.I. for 4 months and fine of
Rs.500/-. In default the R.I.
for one month.

The above said Chart would go to show that, all
the accused persons have been convicted and sentenced
unanimously.

Upon hearing learned counsel Mr. A.D. Shah for
the appellants and learned Govt. Counsel Mr. S.R.
Divetia, we feel that, we are being presented with a case
in which our endeavour should be to sift the grain from
the chaff, as has been said by various pronouncements of
the Apex Court. We are required to say so, looking to
the overlapping and contrary versions being presented by
the complainant and the witnesses. Our work has been
complicated by the fact that none of the witnesses,
including the complainant is consistent in respect to the
number and the names of the accused persons, the weapons
utilised by them and the injuries caused by them to the
two deceased persons and to the injured complainant and
other witnesses.

At the out set we shall have to say that, much
reliance cannot be placed upon the F I R which came to be
given by complainant Babubhai PW-9 Exhibit-72 which is at
Exhibit -79. It appears that the F I R could be
registered on the next day morning after everything was
made known to the police. We feel that, we should begin
the reading of the evidence with the testimony of PW-14
Mohanbhai Exhibit-80, who at the relevant time was
officiating as the Village Police Patel. The say of
Mohanbhai is that, he was asleep at his house, but at
about 10 to 11 p.m. he was called by one Manji and had
informed that there is a hue & cry at the dela and
therefore he had gone there, in company of other persons.
He was able to see two persons, namely Surabhai and one
another man who " was the brother-in-law of one Lakha,
and who used to stay at village Nesda." Police Patel
Mohanbhai by saying so refers to the accused no.11. He
also says that when he had reached the dela he had seen
about five to six persons coming out of the dela and

that, they were duly armed with deadly weapons like spears, sticks and pipes. Any how, Police Patel Mohanbhai says categorically that, he was not able to identify any of these five to six people who were coming out of the dela. It is not in dispute that, excepting accused no.11 all the other accused persons were the inhabitants of village Monpar. Moreover according to him, when he had approached Bagdana Police Station, the police had told him that, two accused persons have already presented themselves at the police station and according to the version being provided by them was that, each of them had given two stick blows to some persons. According to Mohanbhai, he was advised by the police that looking to this trifle incident no bundobust was required in the village, but he should arrange for a tempo van so that the police people can go to village Monpar. According to this witness, later on he and police personnel had reached Monpar and had gone to the house of Bhimji Jasmat who was injured. Later on they had shifted Kalubhai, the deceased from the dela. Shambu Jiva who was also injured along with one Babu had also reached where the tempo van was parked and later on they were shifted to Mahuva Hospital. According to him, deceased Kalubhai had succumbed to his injuries within a period of about 1/2 hour. Lastly Mohanbhai says that, excepting accused no.11, all the assailants persons were the inhabitants of village Monpar and they were known to him but yet he could not identify them. It is also the say of this witness, during the cross examination that, Bagdana police station is at a distance of about 2 1/2 kilometer from village Monpar. He has admitted that, though he speaks of " brother in law of Lakhabhai" during his evidence he had not stated anything before the police in this respect. He has also admitted that, though he was not able to identify five to six people who were coming out of the dela, no identification parade was arranged. He has also admitted that, he had given only two names, one of Surabhai and the other one of accused no.11 as the brother in law of Lakhabhai, and that he had not given the name of any other accused persons to the police. This makes the case of the prosecution weak so far as the oral testimony of the Village Police Patel is concerned.

When the police evidence is referred once more the same picture emerges. PW-17 Unarmed Head Constable Chimanlal Exhibit-83 has stated that, he was present at Bagdana police station and at about 1.30 a.m. Police Patel Mohanbhai had informed him regarding the incident at Monpar and as the PSO happened to be one Umarbhai, he had obtained his orders and later on he had gone to village Monpar by the tempo van and had gone to the dela.

According to him, the dela was locked from outside and therefore, Babubhai was summoned and the dela was got opened. This evidence therefore of Chimanlal would go to show that, when he was on duty at Bagdana police station he was told regarding the incident which had occurred at village Monpar and that, he had passed on the information to the PSO Umarbhai. He has stated in his evidence that he knows that, ordinarily when the occurrence of a cognizable offence is brought to the notice of the police the FIR requires to be registered. He says that nothing was done at Bagdana police station, though Police Patel Mohanbhai had informed them regarding the incident. His say further is that, when they had a visit of village Monpar, PSI Solanki was also in their company and that the PSI had waited at Monpar for about 30 to 45 minutes. Even after having the visit of the village and after knowing regarding the occurrence of a cognizable offence PSI Solanki had not preferred to register the F IR. One Gambhirsinh, PW-19 Exhibit-89 has said that, he was on duty at Mahuva police station and was incharge upto 9.30 a.m. on September 02, 1990. According to him the medical unit of the Mahuva hospital had sent a yadi and therefore the entry was posted in the Station Diary which is at Exhibit-90. Later on the necessary papers were transmitted to PSI Rathwa and ultimately the yadi was sent to Bagdana police station. He has produced the yadi at Exhibit-91. PSO Umarbhai, PW-20 Exhibit-92 has said that, at about 2.15 a.m. Police Patel and two or three other people had approached him at Bagdana police station and had said that there was a rioting between Kanbis and Khasiyas and therefore the police bundobust should be arranged. Umarbhai has said in his evidence further that, he had gathered the impression that, Police Patel Mohanbhai was not knowing the details regarding the incident and therefore his FIR was not taken. He denies the suggestion which in fact is the say of the previous witness that, the two accused persons had already approached Bagdana police station. During the cross examination Umarbhai has said that he had gathered the necessary information from Police Patel Mohanbhai. Any how he has gone to the extent of saying that from the information supplied to him by Police Patel Mohanbhai, he was not made aware of some cognizable offence which could have taken place at village Monpar. PSI Solanki, PW-21 Exhibit-95 has stated that, he had reached village Monpar at about 3 a.m. and after going to the village he had gone to Mahuva Hospital and later on, after the death of Kalubhai he had recorded the FIR of injured Babubhai in the hospital at about 7.00 a.m. and later on the offence was registered at Bagdana police station. During the cross examination the say of PSI Solanki is that, he had

stayed at village Monpar for about 1/2 an hour and had made certain interrogations also. Any how he has stated that nothing was recorded by him. He says that, he had gathered a clear impression that there was a fight between Kanbis and Khasiyas of the village, but still he had not cared to record the FIR at village Monpar. This evidence therefore would go to show that, firstly the Bagdana police station was informed by Police Patel Mohanbhai and the information was forwarded to PSO Umarbhai, and later on they had gone to village Monpar in company of PSI Solanki, and though there was a revelation of a cognizable offence, nothing was done either at Bagdana or at Monpar and registration of the F I R was deferred till 7.30 next morning. In view of this, we are not in a position to place reliance upon a lately recorded F I R. Our endeavour therefore shall have to sift the grain from the chaff from the other evidence which is made available to us.

Benuba, PW-10 Exhibit-73 appears to be somewhere in the root of the whole incident. The village people had ascribed an illicit intimacy between Benuba and deceased Kalu Jasmat. Benuba in her evidence tries to pose herself as an eye witness. She has said that, she had gone out of her house, for answering the call of nature and she was caught hold of by six accused persons and later on she was taken to the dela of deceased Kalu Jasmat, and she was tied down by a rope with the cart and in the same way, deceased Kalu Jasmat was also tied down. Her say is that, later on the assailants, had started belabouring deceased Kalu Jasmat by sticks, axes and spears. Her say further is that, later on she was released and she was able to come out of the dela. Her say is that, Kalu and Bhimji had received serious injuries, and later on they had died. She says that, she does not know the real reason for the assault upon her, the two deceased and the injured witnesses. The contradictions brought out would go to show that, she had changed the version because originally her say was that, she had gone to the Wada of one Barwad for answering the call of nature and from that place she was abducted. The contradiction would go to show that she has changed her version. More over, her say is that each of the accused persons who were about five in number had given atleast five blows to the deceased. If this version is to be accepted, one would expect atleast about 25 injuries by lethal weapons like spear and axe which is not a fact. This fact becomes clear from the medical evidence on record. More over her say is that, only five persons were there initially and later on six remaining accused had come there. This is also a changed version. More

over her version before the police was that, Lakha and Dhama, accused no.4 and 1 respectively had opened the doors of the dela after jumping from the boundary wall. But it appears that, her version that the deceased Kalu himself had opened the dela is a palpable false say. When the evidence of PSI Solanki PW-21 Exhibit-95 is referred, it appears that it was revealed during the investigation that Benuba was probably not present at the time of the incident and that, she was not the eye witness. It should be appreciated that, Benuba had gone to the extent of saying that she was raped. PSI Solanki says that there was absolutely no evidence to warrant such a conclusion. Therefore, from the above said contradictions in the evidence of Benuba and the say of PSI Solanki, it appears that Benuba was not an eye witness to the incident. Her evidence therefore would not assist the prosecution to connect the accused persons with the commission of the crime.

Complainant Babubhai, PW-9 Exhibit-72 has stated that his father Kalu Jasmat ordinarily used to sleep at the dela and on that fateful night also, he was asleep there. According to him, his uncle deceased Bhimji and his son had informed him that, there was something untoward at the dela which is also known as Vanda or the Karkhana, and therefore he had gone there. He says that accused persons no. 1 to 5 and 7 to 9 were present there. According to him, all accused persons, namely accused no.1 to 5 and 7 to 9 had inflicted blows with the respective weapons which they were having. This is his say in respect of the assault on deceased Bhimji Jasmat. His say further is that, accused no.1 Lakha had inflicted blows with a spear on his right elbow. This evidence requires to be read along with his further say that, accused persons no. 6, 10 and 12 were found to be running near the spot of the occurrence. It appears therefore that, he is not consistent with the case of the prosecution. He clearly exonerates accused persons no. 6, 10 and 12 from the assault by saying that, they were found to be running near the spot of the occurrence. He has stated in his FIR that he had received the injury on the right wrist. But any how, in his evidence he has gone to the extent of saying that, he had received some injury on the face only and that, this had happened while he had fallen down in his efforts to run away from spot of the occurrence. Therefore PW-1 Babubhai, the complainant has altogether a different version to be given.

Heavy reliance is sought to be placed upon the oral testimony of PW-11 Shambubhai Exhibit-76. His say

is that, after the Katha in the village was over, he had gone to the Chowk and at that time Police Patel Mohanbhai, Bhimji Jasmat and Babu Bhimji had informed him regarding some untoward incident at the dela of deceased Kalu Jasmat and therefore, he had gone there and had seen certain accused persons with the deadly weapons. He refers to accused persons No. 1, 2, 4, 5 and 7 only. He does not make any reference of accused No. 3, 6 and 8 to 12. According to him, all the named accused persons had chased him and accused no.7 Jaggu Dahya had inflicted a spear blow resulting in the injury near the right eye. He has also stated that, accused no.2 Sura had given him an axe blow on the right upper arm. But when his evidence is read along with the evidence of PSI Solanki, it appears that his evidence suffers from numerous omissions and contradictions and they should be recognised as total and fatal to the case of the prosecution. He does not ascribe any specific overt act to any of the accused. He had never stated before the police that accused no.7 Jaggu had given him a pipe blow on the head. In the same way he had never said before the police that the accused no.2 Sura had inflicted axe blow on his right upper arm. In the same way he does not state anything regarding the presence of accused no.4 Lakha with the spear. He also admits that, no test identification parade was arranged, so that, he could identify any other assailants. This evidence of Shambu Jiva PW-11 therefore does not support the case of the prosecution in the way in which it was sought to be presented before the Court.

PW-12 Manubhai Exhibit-78 has stated that, he was at his house with his father, deceased Bhimji Jasmat and when his father had gone to sleep he was busy reading. According to him, he had heard a hue & cry at the dela which is also known as a Vanda and therefore he had informed deceased Bhimjibhai regarding this and thereafter he and his father had gone to the dela. According to him, the accused persons were present there with the deadly weapons. Any how, he speaks of accused no. 1 to 5, accused no.7 and accused no.10. In other words he is entirely silent in respect of accused persons no. 6, 8, 11 and 12. According to him, the accused persons had chased him with the weapons and he was abused. Any how though he names the above said accused persons and does not refer to the other accused persons, as indicated above, he does not attribute any overt act to any accused qua the injured persons and two deceased persons. The evidence of Manubhai PW-12 therefore also does not run parallel to the case of the prosecution.

Therefore, upon the close scrutiny of the evidence tendered by the complainant and other witnesses, it appears that, they are not consistent in respect of the accused persons, weapons being carried by them and the acts and duties committed during the course of the incident. They speak of different accused persons and they prefer to exonerate different accused persons. As pointed out by us hereinabove, the evidence of the prosecution witnesses is found to be so overlapping and inconsistent that nothing definite could culled out from it, both in respect of the presence of the accused persons and the role played by them in the incident.

In view of this position there is an endeavour on the part of the learned Govt. Counsel Mr. Divetia to urge that the real clue would be available from the Dying Declaration of deceased Bhimji Jasmat at Exhibit-26 and two other documents at Exhibit-25 and Exhibit-77 which are admissible in evidence. Exhibit-25 appears to be a note given by witness Shambubhai, PW-11 Exhibit-76, to whose evidence the reference is made earlier. Executive Magistrate Baraiya, PW-1 Exhibit-76 has stated that, he had contacted witness Shambu Jiva and that as Shambu Jiva was not able to speak anything, Exhibit-25 came to be recorded. According to him, later on the statement at Exhibit-77 came to be recorded by him which was given by Shambu Jiva. The emphasis on these two statements by learned Govt. Counsel Mr. Divetia is, despite the fact that Shambu Jiva could survive his injuries. According to Mr. Divetia, though the above said two documents would not be admissible in evidence as the dying declaration, they would be yet admissible in evidence as the statements before a person who was entitled to investigate into the matter. In this respect, firstly the reference shall have to be to the Supreme Court pronouncement in *Gentela Vijayavardhan Rao & Anr. Appellants Vs. State of Andhra Pradesh, Respondent, 1996(3) Crimes 197 (SC)*. In this decision, while considering the provisions contained in Sections 32 and 157 of the Evidence Act, 1872, it has been said that the contours provided in Section 164(1) of the Code of Criminal Procedure would cover a statement which has been made before a Magistrate. It is clarified that, however such a statement, so long as its maker is alive cannot be used as substantive evidence under Section 32 of the Evidence Act. Nonetheless it would be admissible under Section 157 of the Evidence Act. Its user would be limited to corroboration or contradiction of the testimony of its maker. Practically the same is the principle laid down by the Supreme Court in *Maqsoodan and others, Appellants Vs. State of U.P. Respondent, etc.*

Air 1983, S.C. 126. In this decision it has been said while considering the provisions contained under Section 32 and 157 of the Evidence Act, 1872 that, when the maker of a statement is not dead, the statement is admissible under Section 157 and not under Section 32 of the Evidence Act. Regard being had to these two Supreme Court decisions, it can never be disputed that those two documents at Exhibit-25 and Exhibit-77 would be admissible in evidence. But as pointed out by the Supreme Court in case of Gentela Vijayavardhan Rao & Anr. (supra), the user of such documents would be limited to corroboration or contradiction of the testimony of the maker. We should atonce point out that, these two documents at Exhibit-25 and Exhibit-77 do not in any way corroborate the say of witness Shambu Jiva, the maker thereof before the Court which has been recorded at Exhibit-76. This is so because in both these documents he makes a reference in respect of four accused persons, that is accused no.1 Dhama Jasa, accused no.3 Gambhir Kalu, accused no.4 Lakha Dahya and accused no.5 Bhupat Dahya. Strangely enough Shambu Jiva, the maker of the statement in his sworn testimony at Exhibit-76 does not make any mention of the above said four accused persons, but on the contrary speaks of accused persons no. 2, 4, 1 and 7. At a later juncture he makes a half hearted reference to the accused no.5 Bhupat Dahya. But again his say is that the pipe blow was given by accused no.7 Jaggu Dahya, while one man whose name he is not giving had given him. One another man whose name he is not giving had given him an axe blow. Therefore when the above said two documents at Exhibit-25 and 77 respectively are read along with sworn testimony of Shambu Jiva, the maker at Exhibit-76 it is abundantly clear that, they not only do not corroborate his say but on the contrary run counter to his say before the Court. This would lead us to conclude that no reliance could be placed upon the sworn testimony of Shambu Jiva at Exhibit-76 and in the same way, no assistance could be derived from the above said two documents or statements at Exhibit-25 and Exhibit-77, though they are admissible in evidence under Section 157 of the Evidence Act, 1872.

The concentration therefore should shift to dying declaration of Bhimji Jasmat at Exhibit-26. Before going to the say of deceased Bhimji Jasmat in his dying declaration at exhibit-26, we should refer to a contention coming from learned counsel for the appellants Mr. Shah, who submits that, according to Executive Magistrate Baraiya PW-1 Exhibit-23, this dying declaration came to be recorded at about 6.30 a.m. in presence of Dr. Kataria. But according to Dr. Kataria,

PW-2 Exhibit-27 he had resumed duty at about 8 a.m. on that day. Dr. Kataria indeed says that the dying declaration bears his certificate regarding the fit state of mind of the maker of the statement to make out a dying declaration. The contention therefore coming from learned counsel Mr. Shah is that, no reliance whatsoever could be placed upon the dying declaration of Bhimji Jasmat at Exhibit-26. But we should point out that, though Dr. Kataria says that he had resumed duty only at about 8 a.m., according to him, the dying declaration bears his endorsement or the certificate. Because of this say coming from Dr. Kataria, we are not inclined to accept the contention coming from learned counsel Mr. Shah that no reliance whatsoever could be placed upon the dying declaration at Exhibit-26.

When we concentrate upon the dying declaration of Bhimji Jasmat, it is clear that, according to him he was assaulted by accused persons no.3 Gambhir Kalu, No.4 Lakha Dahya, No.5 Bhupat Dahya and No.7 Jaggu Dahya. In other words, this dying declaration definitely in our view implicates the above said four accused persons. We think that the evidence in form of dying declaration clearly suggests that atleast these people were the people who had launched the lethal attack on deceased Bhimji Jasmat.

Accused No.6 Puna Taba is reported to be no more during the pendency of the appeal. Therefore, excepting the accused person No. 3, 4, 5 & 7 and other accused persons in our view require to be acquitted of all the offences for which they have found to be guilty. The appeal to the said extent is allowed and they are accordingly ordered to be acquitted. Fine if paid by any of them shall have to be refunded.

The next question would be as to what offence could be said to have been committed by the above said accused persons no. 3, 4, 5 & 7. Learned counsel Mr. Shah for the appellants urges that, there is an omnibus general allegation that the accused persons had belaboured the deceased persons and injured, without ascribing any specific role to them. In the submissions therefore of the learned counsel Mr. Shah, they could be convicted for the offence punishable under Section 326 I.P.C. In this respect the reliance is being sought to be placed upon the Supreme Court pronouncement in Rajaram Appellant, Vs. State of M.P., 1994 Supp(2) Supreme Court Cases 153. In that case of rioting of murder there was an omnibus allegation that about 19 persons had inflicted injuries on the deceased. The medical evidence was not

supporting such an omnibus allegation because only one injury on the deceased was found to be fatal, while rest of the injuries were by contusions on legs, arms and palms. It was therefore held by Supreme Court that, in such circumstances it could not be said that the common object of the assembly was to cause death. It was also found that the conviction of only those two persons who had attacked the deceased with lethal weapons was justified. Accordingly the appellants were found to be liable to be convicted under Section 326 read with Section 149 I.P.C.

In our view, learned counsel Mr. Shah for the appellants accused is not in a position to derive any assistance from the said pronouncement of the Supreme Court, because as is clear from the decision itself, despite the omnibus allegation of about 19 persons inflicting injuries on the deceased, there was only one injury on his person which was found to be fatal. Dr. Kataria PW-2, Exhibit-27 who had performed the autopsy on the dead body of deceased Kalu Jasmat has proved the postmortem Report at Exhibit-28. A conjoint reading of the oral evidence of Dr. Kataria and the postmortem Report at Exhibit-28, it is clear that there was a vertical incise wound on the right arm with an oblique incise wound on the right elbow along with the injury on the skull which had proved to be fatal later on. So far as Bhimji Jasmat is concerned, Dr. Deshmukh PW-22, Exhibit-103 who had performed the autopsy on the dead body of deceased Bhimji Jasmat, who had died at Ahmedabad Civil Hospital has said that, there were as many as ten injuries on the person of the deceased. There were two serious injuries, one on the left parietal region and the other one is the Left Iliac Fossa. This say is being substantiated by the Postmortem Report at Exhibit -104. Looking to these injuries caused to the deceased persons, we are inclined to hold that, their attack was atleast with the knowledge that the injuries were likely to cause the death of the deceased persons. Though we are placing reliance upon the dying declaration of Bhimji Jasmat, we are preferred to refer to the injuries sustained by Kalu Jasmat also because both of them have died during the one and the same incident. The intention on the part of the assailants cannot be said to be without the knowledge that the injuries which they were inflicted were likely to cause the death of the deceased. In our view, therefore, the case in respect of the Appellants No. 3, 4, 5 and 7 would fall within the purview of Section 304 Part-II I.P.C. We are fortified in this view of ours by the Supreme Court pronouncement in Maliya And Others, Appellants Vs. State Of Rajasthan, Respondent, 1994

Supreme Court Cases (Cri) 1413. It was a case of all the four accused together giving four or five blows to the deceased. The trial Court had convicted the accused under Section 304 Part-II I.P.C. The High Court while reversing the said finding had come to the conclusion that the offence made out was one punishable under Section 302 r/w Section 34 I.P.C. This conviction was altered to Section 304 Part-II r/w Section 34 I.P.C. In Ram Jattan and others, Appellants Vs. State of U.P. Respondent, Air 1994 S.C. 1130, there was the causing of death by multiple injuries inflicted by 12 accused persons on non vital parts of the body. The medical report was not certifying the injuries sufficient to cause death in ordinary course of nature. The appellants came to be convicted under Section 304 Part-II r/w Section 149 I.P.C.

Regard being had to the injuries which we have indicated above, in our view the appellants accused No. 3, 4, 5 and 7 require to be convicted for the offence punishable under Section 304 Part-II, r/w Section 34 I.P.C. We order accordingly. The conviction therefore shall stand altered - qua the said appellants accused.

Therefore, in the result, the present Appeal succeeds in part. We have made it clear that, during the pendency of the present Appeal, appellant no.6 Puna Taba is no more. All the rest of the accused persons are hereby acquitted of the offence punishable under Section 302 r/w Section 149 I.P.C. and under Section 135 of the Bombay Police Act.

The Appellants accused persons No. 3, 4, 5 and 7 are hereby convicted for the offence punishable under Section 304 Part-II I.P.C. Each of them is hereby sentenced to the R.I. for five years. The rest of the accused persons shall stand acquitted of all the charges levelled against them. They should be set at liberty forthwith, if not required in any other criminal case or proceedings.
